Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REBECCA A. BERG,

Petitioner,

v.

NORAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In Title VII and equal pay actions, does the moving party have the initial burden in a summary judgment motion to show the absence of evidence to support the plaintiff's case or must the nonmoving party first establish a prima facie case?

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Petitioner, Rebecca A. Berg (hereafter, Ms. Berg), respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999) (App. A). The opinion of the district court in *Berg v. Norand Corp.*, Civ. No. C95-227-EJM (N.D. Iowa Dec. 16, 1997) is not published and is set forth in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit ("Court of Appeals") was entered on March 5, 1999. The Court of Appeals denied a timely petition for rehearing or rehearing en banc on April 9, 1999 (App. B). This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 206(d) (1998). *Prohibition of sex discrimination.*

> (1) No employer having employees subject to any provisions of this section shall discriminate,

within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amount owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

42 U.S.C. § 2000(e-2)(a) (1998). ***Unlawful Employment Practices.***

(a) Employer Practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Rule of Civil Procedure 56(c). ***Motion and Proceedings Thereon.***

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Federal Rule of Civil Procedure 56(e). ***Form of Affidavits; Further Testimony; Defense Required.***

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or attached therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere

allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

The fundamental question in this case is, in Title VII and Equal Pay actions, whether the moving party has the initial burden in a summary judgment motion to show the absence of evidence to support the plaintiff's case or whether the nonmoving party must first establish a prima facie case.

Ms. Berg began her employment with Norand Corporation (hereafter, Norand) on or about March 26, 1990, as its tax manager. On September 9, 1991, she assumed additional responsibility by becoming Norand's manager of the payroll department and risk management. Despite her management responsibilities over several departments, Ms. Berg was compensated less than the male management employees of Norand, even though their job duties and responsibilities were comparable in quantity and quality. As indicated by answers to interrogatories and Ms. Berg's own statement, the other female managers at Norand were also compensated less than the male managers with comparable positions and duties. Ms. Berg, as the payroll manager, had personal knowledge of the compensation of both male and female employees.

In her Complaint filed on July 7, 1995, Ms. Berg brought an action against Norand alleging, among other claims, violation of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e] and violation of the Equal Pay Act of 1963 [29 U.S.C. § 206(d)]. On August 26, 1997, Norand filed a motion for summary judgment alleging that Ms. Berg had failed to establish a prima facie case of discrimination.

In an Order entered December 16, 1997, the Honorable Judge Edward J. McManus granted summary judgment to Norand "on all remaining counts" of Ms. Berg's Complaint[1]. In doing so, the district court found that Ms. Berg's evidence regarding her claims of unequal pay were merely conclusory and was insufficient to establish a disputed issue of material fact. Ms. Berg timely appealed the district court's decision to the United States Court of Appeals for the Fighth Circuit.

On March 5, 1999, the Eighth Circuit affirmed the judgment of the district court on Ms. Berg's Title VII and Equal Pay claims stating that "Berg provides only conclusory affidavit testimony that the male managers to whom she compares herself have jobs 'equal' to hers". *Berg*

---

1. The district court granted summary judgment to Norand on Ms. Berg's Title VII claim even though Norand failed to include this claim in its request for summary judgment. In its motion, Norand simply stated that it was "entitled to judgment as a matter of law on all remaining claims, as set out in Norand's Brief and Statement of Undisputed Facts, filed concurrently with this Motion." Norand did not argue against Ms. Berg's Title VII claim in either its Brief or its Statement of Undisputed Facts and in fact, did not even mention that claim. The court granted summary judgment in favor of Norand, therefore, on a claim for which summary judgment was not requested.

v. Norand Corp., 169 F.3d 1140, 1146 (8th Cir. 1999), citing *McLaughlin v. Esselte Pendaflex Corporation*, 50 F.3d 507 (8th Cir. 1995) and *Equal Employment Opportunity Commission v. Universal Underwriters Insurance Company*, 653 F.2d 1243 (8th Cir. 1981).

Ms. Berg has filed this Petition for a Writ of Certiorari based upon the issues and argument presented herein.

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND THIS COURT'S PRIOR RULING IN *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986) WITH REGARD TO THE INITIAL BURDEN IN A MOTION FOR SUMMARY JUDGMENT.

Ms. Berg's Petition for a Writ of Certiorari should be granted because the opinion below and the decisions of other courts of appeal are contrary to this Court's prior ruling in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) that the initial burden is on the moving party in a motion for summary judgment to show the absence of evidence to support the plaintiff's case. *See Brinkley v. Harbour Recreation Club*, No. 98-2035, 1999 WL 387436, (4th Cir. June 14, 1999); *Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612 (8th Cir. 1998); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469 (7th Cir. 1995). It is apparent from those courts' reference to the burden shifting analysis for Title VII cases as set forth in *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973), that there is confusion among the courts as to the effect of Fed. R. Civ. P. 56(c) in Title VII and Equal Pay cases. Indeed, those courts' holdings relieve the moving party of any burden of proof in the event the nonmoving party is unable to establish a prima facie case.

The courts' confusion over this issue is perhaps most apparent in the language used by the Eighth Circuit Court of Appeals in *McLaughlin v. Esselte Pendaflex Corporation*, 50 F.3d 507 (8th Cir. 1995). In reviewing a grant of summary judgment for the employer in a Title VII action, that court held in one paragraph that "[I]n a Title VII action, **the plaintiff carries the initial burden** of establishing a prima facie case of discrimination" and two paragraphs later ruled that "**[T]he moving party, Pendaflex, has met its initial burden** of showing that there is a lack of evidence to support McLaughlin's case." *McLaughlin* at 510-511. (Emphasis added).

Justice Brennan predicted the confusion of the district courts with regard to this burden in his dissenting opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in which Chief Justice Burger and Justice Blackmun joined. Justice Brennan stated:

> . . . [T]he Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I

> would have written separately to explain more clearly the law in this area. . . .

Celotex at 329. (Brennan, J. dissenting).

This Court in *Celotex* interpreted Fed. R. Civ. P. 56 as it relates to motions for summary judgment as follows:

> Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."
>
> Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

Celotex at 324. Such interpretation of Rule 56 indicates that with regard to motions for summary judgment, the initial burden is on the moving party to show an absence of evidence to support the nonmoving party's case. The *Celotex* Court further held that ". . . the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case."

In its motion for summary judgment, Norand made bald, non-specific references to the pleadings and thereby concluded that Ms. Berg had not established a prima facie case of discrimination. Ms. Berg thereafter submitted to the district court Norand's answers to interrogatories showing the wage discrepancies between male and female managers including Ms. Berg, her deposition testimony as well as those of her supervisor at Norand and Norand's director of the human resources department, and her affidavit in which she designated specific facts showing that there was a genuine issue for trial as required under Fed. R. Civ. P. 56(e) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Both the district court and the court below have focused only on Ms. Berg's submission of her own affidavit, stated that it was merely conclusory, and held that she failed to establish a prima facie case of discrimination. Those courts did not even address the question of whether Norand had sustained its burden of showing an absence of evidence to support Ms. Berg's case.

It is imperative — not just for a just disposition of the present case, but for the impact such a determination will have on all claims under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e] and violation of the Equal Pay Act of 1963 [29 U.S.C. § 206(d)] — that this Court determine which party has the initial burden of proof in Title VII and Equal Pay cases and clarify what, if anything, is required of the moving party to sustain a motion for summary judgment.

CONCLUSION

The Court should grant Ms. Berg's Petition for a Writ of Certiorari on this important issue of the burden of proof in a motion for summary judgment in Title VII and Equal Pay cases. It is imperative that the Court determine whether its interpretation of Fed. R. Civ. P. 56(c) in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) applies to all motions for summary judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED MARCH 5, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-1232

Rebecca A. Berg,

Appellant,

v.

Norand Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: October 15, 1998
Filed: March 5, 1999

Before BOWMAN, Chief Judge, HANSEN, Circuit Judge, and VIETOR,[1] District Judge.

HANSEN, Circuit Judge.

Rebecca Berg brought this employment discrimination claim against Norand Corporation (Norand), alleging

1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

Norand discriminated against her based on her disability (Berg is a non-insulin dependant diabetic) and her sex. The district court[2] granted summary judgment in favor of Norand on its second motion for summary judgment and Berg appeals.[3] We affirm.

I.

Because the district court granted summary judgment in favor of Norand, we state the facts in the light most favorable to Berg, the nonmoving party. *See Burroughs v. City of Springfield*, 163 F.3d 505, 506 (8th Cir. 1998). Norand hired Berg to manage its tax department in March 1990 and added the management of Norand's payroll and risk management departments to her responsibilities in September 1991. Berg routinely worked 70 to 80 hours per week to meet the demands of her job. By early 1993, Berg's health began to deteriorate and she was unable to continue the 70- to 80-hour pace. Berg took a medical leave of absence in February 1993. In March 1993, after returning to work, Berg received her first ever poor performance reviews for failing to keep up with her workload. Norand placed her on probation and set specific goals for improving her performance. Norand also relieved Berg of her payroll

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2. The Honorable Edward J. McManus, United States District Judge for the Northern District of Iowa.

3. The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, previously dismissed one of Berg's claims for failure to state a claim but denied Norand's Fed. R. Civ. P. 12(b)(6) and alternative summary judgment motions on her other claims.

department responsibilities to help her timely complete her priority projects. Berg still failed to meet Norand's expectations. Berg was diagnosed with diabetes in May 1993, and she immediately informed her supervisors.

On August 2, 1993, Berg tendered her written resignation to Bob Hurd, her immediate supervisor, because of the stress from the long hours and her work environment. In her resignation, Berg agreed to stay until her year-end projects were completed, tentatively through October. Hurd verbally accepted her resignation. Berg attempted to withdraw her resignation on August 19, asking instead for an accommodation of reduced work hours to 40 to 50 hours per week. This was Berg's first request for an accommodation. During the August 19 meeting with Mike Wakefield, the director of human resources, Berg discussed her suicidal tendencies. Berg met with Hurd to discuss the attempted withdrawal of her resignation on the following Monday, August 23. The record is unclear as to the exact date, but Berg had discussed her suicidal tendencies with Hurd a few days before the August 23 meeting. Shortly after his meeting with Berg, Hurd discussed her situation with Wakefield. They placed Berg on immediate medical leave and insisted that she see a psychiatrist that afternoon, though she had an appointment with her own doctor the next day. Because the psychiatrist Berg was to see was unavailable, Berg was admitted to the hospital overnight, allegedly against her will. She saw her own doctor and was released the following morning.

Berg returned to work a week later. No one discussed Berg's pending resignation or her attempt to withdraw her

resignation following her return. Berg was terminated on December 7, 1993, purportedly because of her resignation and continued poor performance.

Berg filed disability discrimination claims against Norand under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (1994), and the Iowa Civil Rights Act of 1965 (ICRA), Iowa Code §§ 216.1-.20 (1993). Berg alleged sex discrimination based on unequal pay under the ICRA; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-19 (1994); and the Equal Pay Act of 1963, 29 U.S.C. § 206 (1994). Finally, Berg brought supplemental state law claims of negligent misrepresentation, breach of implied contract, and false imprisonment. The FLSA claim was dismissed on an earlier Fed. R. Civ. P. 12(b)(6) motion. The district court granted summary judgment in favor of Norand on Berg's remaining claims. Berg does not appeal the dismissal of the sex discrimination claims brought under the ICRA, Title VII,[4] and the FLSA.

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4. Berg argues that Norand did not move for summary judgment on the Title VII claim and thus, the district court did not properly dismiss it. Norand included the Title VII claim in its motion for summary judgment but specifically argued only under the ICRA and Equal Pay Act in its brief. The standards in an unequal pay for equal work claim are the same under Title VII and the Equal Pay Act. *See Kindred v. Northome/Indus. Sch. Dist.*, 154 F.3d 801, 803 (8th Cir. 1998), *cert. denied*, 1999 WL 16149. Berg had notice of, and in fact argued, the elements of the Title VII claim when she argued the Equal Pay Act claim. *Cf. Walker v. Missouri Dep't of Corrections*, 138 F.3d 740, 742 (8th Cir. 1998)

(Cont'd)

Appendix A

II.

We review de novo the district court's grant of summary judgment in favor of Norand, using the same standards used by the district court. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). "Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citations omitted); Fed. R. Civ. P. 56(c). While we have said that summary judgment is generally inappropriate in discrimination cases because they are often based on inferences that the fact finder may or may not draw, *see Breeding*, 164 F.3d at 1156, there is no "discrimination case exception" to the application of Fed. R. Civ. P. 56, and it remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial.

A. Disability Discrimination

To state a claim under either the ADA or the ICRA,[5] Berg "must demonstrate that [she] has a disability as defined

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(Cont'd)
(reversing grant of summary judgment where district court based its decision on an element of an ADA claim that the opposing party was not aware was at issue). Thus, the disposition of the Title VII claim was properly before the district court on summary judgment.

5. Iowa courts look to the ADA, its regulatory interpretations, and its caselaw in construing a disability claim under the ICRA. (Cont'd)

in the ADA; that [she] is qualified to perform the essential functions of the job at issue, either with or without reasonable accommodation; and that 'because of' [her] disability, [she] suffered an adverse employment action." *Burroughs*, 163 F.3d at 507 (citations omitted). The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Iowa uses similar criteria under the ICRA to define disability. *See Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997) (citing Iowa Admin. Code § 161-8.26(1) (1993)). The Equal Employment Opportunity Commission (EEOC) regulations define "major life activities" to include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1998). To establish that she is substantially limited in the life activity of working, Berg must show that she is limited from performing a class of jobs or a broad range of jobs within various classes. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." § 1630.2(j)(3)(i).

Berg claims that her diabetes is disabling because it limits her major life activity of working by: limiting her to

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(Cont'd)

See Fuller v. Iowa Dept. of Human Servs., 576 N.W.2d 324, 329 (Iowa 1998); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997). Thus, our analysis, though referring only to the ADA, applies also to Berg's ICRA claim.

a 40- to 50-hour work week; causing her continuous joint pain; causing her difficulty with her speech; and making it difficult to focus on her job due to the pain. However, she admits that she could effectively perform her duties at Norand if her work load was reduced to 40 to 50 hours per week. (*See* J.A. at 85.) Berg's only request for an accommodation is for reduced hours. (*See id.* at 286-87.)

"Not every physical or mental impairment 'counts' for ADA purposes, because most disabilities from which people suffer (bad vision, impaired hearing, arthritic joints, diabetes) do not have a substantial enough effect on their major life activities." *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 675 (7th Cir. 1998). Such is the case with Ms. Berg. In her resistance to summary judgment, Berg only claimed that her diabetes limited her major life activity of working. (*See* J.A. at 177, 180.) Subsequent to her termination from Norand, Berg started her own tax and accounting practice and became the chief financial officer of a construction company. She concedes that she has never been unemployed. (*See* J.A. at 194.) Berg has failed to show any class of jobs or broad range of jobs from different classes from which she is excluded because of her diabetes. *See* 29 C.F.R. § 1630.2(j)(3)(ii) (listing factors for determining whether an individual is limited in the life activity of working). Thus, Berg is not substantially limited in the major life activity of working. *See Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (finding no substantial limitation where the plaintiff found a similar job); *Miller v. City of Springfield*, 146 F.3d 612, 614-15 (8th Cir. 1998) (disqualification from one's job of choice is not substantially limiting). We find it hard to say that being limited to a 40-

to 50-hour work week substantially limits one's ability to work. *See, e.g., Muthler v. Ann Arbor Mach., Inc.*, 18 F. Supp. 2d 722, 729 (E.D. Mich. 1998) (heart condition that restricted management employee to 40-hour week did not substantially limit major life activity of working); *Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 529 (N.D. Ill. 1997) (same); *Brennan v. National Tele. Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994) ("The inability to work overtime hardly makes plaintiff handicapped.").

Berg asserts for the first time on appeal that Norand perceived her as disabled and thus she fits within the ADA's definition of disabled.[6] *See* 42 U.S.C. § 12102(2)(C). We will not entertain a new argument on appeal from the grant of summary judgment. *See O.R.S. Distilling Co. v. Brown-Forman Corp.*, 972 F.2d 924, 926 (8th Cir. 1992). Thus, we hold that the district court properly granted summary judgment in favor of Norand on Berg's disability claims under the ADA and the ICRA.

B. Wage Discrimination

To establish a prima facie case under the Equal Pay Act, Berg must meet her burden of showing that Norand paid male employees higher wages than it paid her for jobs

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6. Berg argues that she raised this issue in her resistance to summary judgment. However, her resistance merely recited the familiar alternatives for showing a disability under the ADA, one of which is being regarded as disabled. Berg did not argue that Norand in fact regarded her as disabled. The recitation of the statutory alternatives is insufficient to raise the "regarded as having such an impairment" issue.

"requir[ing] equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (1994). *See also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 513 (8th Cir. 1995). In making our assessment, we look at all of the facts of the particular case. "Skill includes such considerations as experience, training, education, and ability. Effort refers to the physical or mental exertion necessary to the performance of a job. Responsibility concerns the degree of accountability required in performing a job." *McLaughlin*, 50 F.3d at 513 (citations omitted).

Berg provides only conclusory affidavit testimony that the male managers to whom she compares herself have jobs "equal" to hers. (*See* J.A. at 306-07). She does not articulate which particular male managers have jobs similar to hers but points out that the average annual salary of Norand's thirty-three male managers is $6,000 to $8,000 higher than the average salary of its seven female managers. (*See id.* at 311-13.) The male managers included in this calculation encompass many disciplines, including, inter alia, finance managers, production managers, engineering managers, and manufacturing managers. Berg does not indicate how the males to whom she compares herself are similar in experience, education, or training. In short, she does not explain how they are similar at all other than that they are "managers." Berg has failed to establish a prima facie case under the Equal Pay Act. *See* 29 C.F.R. § 1620.13(e) (1998) ("Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance."). *See also Equal Employment Opportunity Comm'n v. Universal*

Underwriters Ins. Co., 653 F.2d 1243, 1245 (8th Cir. 1981) ("[A] court must compare the jobs in question in light of the full factual situation . . . .").

Berg asserts for the first time in her reply brief that her replacement, Eric Pugh, received a higher salary than she had received. Not only is this the inappropriate time and place to raise this new argument, but there is evidence in the record that Norand revamped Berg's position and that Pugh held a different job. (*See* J.A. at 121.) We refuse to entertain this new argument and hold that the district court properly granted summary judgment in favor of Norand on the wage discrimination claim.

C. State Law Supplemental Claims

In passing on Berg's state law claims, we apply Iowa law. If Iowa law is unsettled on a particular issue, it is our job to apply the rule that we think the Supreme Court of Iowa would follow. *See Novak v. Navistar Int'l Transp. Corp.*, 46 F.3d 844, 847 (8th Cir. 1995).

1. Breach of Implied Contract

The employment-at-will doctrine, allowing an employer to terminate an employee for any lawful reason, is alive and well in Iowa. *See Lockhart v. Cedar Rapids Community Sch. Dist.*, 577 N.W.2d 845, 846 (Iowa 1998). Berg signed an employment agreement with Norand that specifically provided that her employment was at-will and that any employee handbooks were strictly guidelines and could not constitute a contract. (*See* J.A. at 122-23.) Iowa courts look

with favor upon such express disclaimers. *See, e.g., Jones v. Lake Park Care Ctr., Inc.*, 569 N.W.2d 369, 376 (Iowa 1997) (noting that an appropriately drafted disclaimer would ensure that an employee handbook would not create an implied contract). The handbook upon which Berg relies to find an implied contract provides reasons for termination but does not state that they are exclusive. Iowa law disfavors implied contracts and will not imply a contract where to do so conflicts with a written agreement between the parties. *See French v. Foods, Inc.*, 495 N.W.2d 768, 771 (Iowa 1993); *Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421, 426 (8th Cir. 1991) (" '[T]here can be no implied contract on a point fully covered by an express contract and in direct conflict therewith.' *Snater v. Walters*, 250 Iowa 1189, 98 N.W.2d 302, 307 (1959)."). Thus, contrary to Berg's assertions, a written contract of at-will employment trumps an alleged but nonexistent implied contract to the contrary.

2. Negligent Misrepresentation

The Supreme Court of Iowa has foreclosed Berg's negligent misrepresentation claim based on an implied contract. *See Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997) (reaffirming its prior holding "that an action for negligent misrepresentation . . . will not lie for alleged wrongful termination of employment."). Noting the general rule that negligent misrepresentation "applies only to a defendant who is in the business of supplying information to others," *id.*, the court found that because the plaintiffs were at-will employees, any representations concerning the length of employment were not actionable

in tort. Similarly, our holding that there was no implied contract prevents Berg from bringing this claim. "To rule otherwise would permit [Berg] . . . to potentially recover in tort on the same factual grounds on which the law would deny [her] recovery in contract." *Id.* (citing *Fry v. Mount*, 554 N.W.2d 263, 266 (Iowa 1996)).

Likewise, our holding that Berg does not have a disability within the meaning of the ADA or the ICRA disposes of Berg's claim of negligent misrepresentation based on Norand's policy of not terminating an employee based on her disability. Iowa law recognizes a modification to the employment-at-will doctrine, which modification prevents an at-will employee from being terminated for a reason that is contrary to public policy. *See Lockhart*, 577 N.W.2d at 846; *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 559-60 (Iowa 1988). Because Berg was not disabled within the meaning of the ADA or the ICRA, Berg's termination did not contravene public policy or Norand's own internal policy. The district court properly dismissed Berg's negligent misrepresentation claim.

3. False Imprisonment

False imprisonment requires the unlawful detention or restraint of a person against her will. *See Children v. Burton*, 331 N.W.2d 673, 678-79 (Iowa), *cert. denied*, 464 U.S. 848 (1983). We have been unable to find any Iowa cases factually on point. False imprisonment in Iowa is generally applied in cases of false arrest by a police or security officer or in connection with assault or kidnapping charges. *See, e.g., Lenstra v. Menard, Inc.*, 511 N.W.2d 410, 411 (Iowa

Ct. App. 1993) (security officer held plaintiff for alleged shoplifting); *State v. Snider*, 479 N.W.2d 622, 623-24 (Iowa Ct. App. 1991) (assault victim may have action against assailant for false imprisonment related to the assault).

Norand managers Bob Hurd and Mike Wakefield, concerned for Berg's safety after she discussed her suicidal tendencies, arranged for a medical evaluation and "sent" Berg to the hospital. Berg drove herself to the hospital and the hospital admitted her. The actions of the Norand employees did not restrain Berg as required for a false imprisonment claim. *See Newson v. Thalhimer Bros., Inc.*, 901 S.W.2d 365, 367 (Tenn. Ct. App. 1995) (finding element of restraint lacking where employee voluntarily accompanied her supervisor to his office and remained in his office because her supervisor stated he would call the police if she left). Additionally, Berg has provided no evidence that Hurd or Wakefield had anything to do with her hospital admission. Thus, Berg has failed to show that Norand restrained her, as required by *Children* for a false imprisonment claim. *See Fish v. Regents of the Univ. of Cal.*, 54 Cal. Rptr. 656, 659 (Cal. Ct. App. 1967) (holding that an employer is not liable for false imprisonment where its doctor/employee, who expressed concerns about the plaintiff to the admitting doctor, did not act in bad faith or actively participate in the plaintiff's hospital admission for evaluation). We do not believe that the Supreme Court of Iowa would extend the false imprisonment cause of action to cover this conduct. The district court correctly dismissed Berg's claim of false imprisonment.

Appendix A

III.

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION DATED AND FILED DECEMBER 16, 1997

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C 95-227-EJM

REBECCA A. BERG,

Plaintiff,

vs.

NORAND CORPORATION,

Defendant.

ORDER

This matter is before the court on defendant's resisted Motion for Summary Judgment, filed August 26, 1997. Granted.

This matter was fully characterized in the court's[1] order of April 3, 1996, and requires no further elaboration. Defendant Norand seeks summary judgment on plaintiff's remaining claims.[2]

---

1. Honorable Michael J. Melloy.

2. Count 4 was dismissed on April 3, 1996.

Appendix B

> Fed. R. Civ. P. 56(c) provides that summary judgment shall be entered if the "pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding whether to grant a motion for summary judgment, the district court must view the evidence in favor of the party opposing the motion and give him the benefit of all reasonable inferences. *Kegel v. Runnels*, 793 F.2d 924, 926 (8th Cir. 1986). However, parties opposing a summary judgment motion may not rest merely upon the allegations in their pleadings. *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The opposing parties must resist the motion by setting forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*, (citing Fed. R. Civ. P. 56(e) and *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981)).

Green v. St. Louis Housing Authority, 911 F.2d 65, 68 (8th Cir. 1990). Each claim shall be addressed in turn.

Norand first seeks summary judgment on plaintiff's claim that Norand discriminated against her on the basis of her diabetes in violation of the Americans with Disabilities Act (ADA), 42 USC §12101, et seq., and the Iowa Civil Rights Act (ICRA), IC §216. In support of its motion, Norand asserts that plaintiff's diabetes does not substantially limit one or more of plaintiff's "major life activities," and

therefore she does not have a disability within the meaning of the ADA or the ICRA.

Plaintiff, in response, asserts that her diabetes limits her major life activity of working. In support, she asserts that following the diagnosis and initial treatment of her condition, she suffered from a lack of energy, which improved, and she experienced some joint pain when her blood sugars became elevated. She stated that she could very effectively handle a work load of 40-50 hours per week, but that she was unable to keep up with 70-80 hour work weeks. Berg dep. pp. 59-62. She states that prior to the May 12, 1993 diagnosis and treatment of her diabetes, she was not physically able to perform her job. Berg dep. pp. 170-175. Additionally, she states that her physician, Dr. Hazelton, suggested that it was not good for anyone to work more than a 40-50 hour work week, whether diabetic or not. Berg dep. pp. 89, 177. She resigned on August 2, 1993. On August 19, 1993, she presented defendant with a letter rescinding her resignation and requesting that her work hours be reduced to 40-50 hours per week as an accommodation.

A person is disabled under either the ADA or the ICRA if they have a disability that substantially limits one or more of their "major life activities." 42 USC §12102(2)(A), *Probasco v. Iowa Civil Rights Comm'n*, 420 NW2d 432, 434 (Iowa 1988). In *Helfter v. United Parcel Service, Inc.*, 115 F3d 613 (8th Cir. 1997), upon reviewing whether the plaintiff made a showing sufficient to withstand summary judgment on the question of whether there were substantial limitations on the major life activity of working, the court observed that

> "[a]n impairment is a disability only if it significantly restricts a person's ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable skills. *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F3d 1311, 1319 (8th Cir. 1996). The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Id.* The factors to be considered include: the number and type of jobs from which the impaired individual is disqualified; the geographical area to which the individual has reasonable access; and the individual's job training, experience, and expectations. *Probasco v. Iowa Civil Rights Comm'n*, 420 NW2d 432 (Iowa 1988), 29 CFR §1630.2(j)(3)(ii).

Helfter, supra, at 617.

In light of the foregoing standards and the record in this case, it is the court's view that plaintiff has not come forward with a satisfactory showing of a disputed issue of material fact as to whether she has an impairment which significantly limits her ability to perform a class of jobs, or broad range of jobs in various classes. At best, the record supports a conclusion that the only class or range of jobs from which plaintiff is restricted is the narrow range of jobs that require 70-80 hours of weekly work, if indeed jobs that require 70-80 hours of weekly work constitute a "class" or "range" of jobs within the meaning of the disability discrimination laws. Accordingly, defendant's motion shall be granted as to Counts 1 and 2.

Appendix B

Next, defendant seeks summary judgment on plaintiff's negligent misrepresentation claim. The elements of such a claim are as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barske v. Rockwell Intern. Corp., 514 NW2d 917, 924 (Iowa 1994). Norand asserts that Berg cannot make any showing satisfying the elements of this claim.

In response, plaintiff asserts that Norand had written performance policies and procedures, and that she justifiably relied on the written and oral representations stating that Norand would not use sex or a handicap in applying its policies. Plaintiff asserts that she "has also shown the necessary third element in that she has suffered as a result of the misrepresentations of Defendant. Defendant breached its own written policies when it terminated her based on her disability."

In making this claim, plaintiff relies upon her contention that her termination was due to disability. In light of the court's disposition of plaintiff's ADA and ICRA disability

discrimination claims, Norand shall be granted summary judgment on this claim.

Next, defendant seeks summary judgment on Berg's claim for breach of implied contract, wherein Berg asserts that she had an implied contract with defendant that her employment would be terminated only on a showing of good cause in the absence of a written contract or handbook stating that her employment was employment-at-will.

It appears undisputed that plaintiff signed an employment contract with Norand which expressly provides that

> EMPLOYEE acknowledges and agrees that his/her employment with NORAND exists solely at the will of either party and may be terminated by either party at any time without notice and for any cause whatsoever other than for reasons prohibited by law. EMPLOYEE likewise acknowledges and agrees that any NORAND employee handbooks or policies and procedures are strictly guidelines and do not constitute a contract between EMPLOYEE and NORAND.

Defendant's Undisputed Facts at p. 2, Plaintiff's Response. . . at p. 2.

In her resistance, Berg asserts that Norand's Employee Handbook provides that employment may be discontinued by resignation, probationary termination, work force reduction, discontinuance of job, or discipline. Berg asserts

she was not terminated for any reasons listed in the handbook, and that Norand breached its written policy when it terminated her for reasons other than those in the handbook. Berg further asserts that Norand made the representation that it would not use sex or a handicap in the application of its policies.

In *Yockey v. State*, 540 NW2d 418, 422-423 (Iowa 1995), the Court discussed exceptions to the employment-at-will doctrine. The court noted that

> [an] . . . exception to the employment-at-will doctrine arises where an employer's handbook or policy manual guarantees an employee that he or she may be discharged only for cause or under certain conditions. *See Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 455 (Iowa 1989) (citing the Iowa cases which developed the doctrine). These cases hold that such representations implicitly create a unilateral contract, and an at-will employee discharged in violation of the terms of the handbook or policy manual may maintain a breach-of-contract action against the employer. *Id.* An employee handbook may create a unilateral contract only when (1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook has been communicated to and accepted by the employee so as to create an acceptance; and (3) the employee has continued working, so as to provide consideration. *Id.* at 456 (citing *McBride v. City of Sioux City*, 444 N.W.2d 85, 91 (Iowa

> 1989)). Unless the terms are ambiguous, whether such a written instrument binds the parties in contract is a question of law.

Yockey, supra, at 422-423.

While the *Yockey* court noted that a high standard of definiteness is not required in determining the existence of an offer of continued employment, it is the court's view that there exists no disputed issue of material fact as to whether plaintiff's employment was at-will. As noted above, in Berg's signed contract with Norand, it was expressly agreed that her employment was at-will, and that the at-will status would not be affected by any handbook, policies, or procedures. While the handbook noted methods by which employment may be terminated, it is the court's view that no contractual protection arises from this permissive language, especially in light of Berg's unambiguous signed agreement. *See Rasmussen v. Rockwell Int. Corp.*, 29 F3d 628 (8th Cir. 1994) (unpublished), 1994 WL 326080 (discussing application of Iowa law to question of modification of written "at-will" employment contracts). Accordingly, defendant shall be granted summary judgment on this ground.

Next, Norand seeks summary judgment on Berg's claim of false imprisonment, wherein Berg alleges that Norand forced her, through intimidation and without legal authority, to be committed to and restrained in a hospital against her will. In this claim, Berg asserts that on August 23, 1993, following her complaints of depression and having felt suicidal, Norand sent her to a hospital for evaluation. Berg

asserts that she was committed to the hospital upon defendant's direction, intimidated by security guards posted at her examining room upon defendant's direction, and desired to leave, but was intimidated from so doing. She asserts that the hospital staff's actions were carried out upon the explicit or implicit authority of Norand.

The elements of false imprisonment are (1) detention or restraint against one's will, and (2) the unlawfulness of such detention or restraint. *Children v. Burton*, 331 NW2d 673, 678 (Iowa 1983), *cert. denied*, 464 US 848 (1983), citing *Valadez v. City of Des Moines*, 324 NW2d 475, 477 (Iowa 1982).

It is undisputed that plaintiff drove herself to the hospital for the evaluation upon Norand's request. She has not come forward with any support for her contention that any actions of the hospital staff were taken at the direction of Norand, or that Norand attempted in any way to influence the decisions of the medical staff or hospital personnel. Plaintiff having failed to establish a disputed issue of material fact on the question of whether Norand was responsible for any detention, Norand shall be granted summary judgment on this claim.

Finally, Norand seeks summary judgment on plaintiff's claims that she was paid less than male co-workers performing substantially equal work at Norand, all as set forth in Count 2 (IC §216), Count 3 (42 USC §2000e) and Count 5 (29 USC §206(d) (Equal Pay Act)).

To establish a claim under the Equal Pay Act, plaintiff must show that she performed work substantially equal to

that performed by her male counterparts, and that she was paid less for it.[3] *Strecker v. Grand Forks County Social Service Board*, 640 F2d 96 (8th Cir. 1980), *adopted en banc*, 640 F2d 109 (1981).

> Under the statute, equal work means 'jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' 29 USC §206(d). In determining whether the work is equal, the Court must look to the nature of the duties actually required and performed, not the official job description or title.

Id. at 100, citing *Katz v. School District of Clayton, Missouri*, 557 F2d 153, 156 (8th Cir. 1977).

In support of her resistance, plaintiff asserts in her affidavit that male employees in management were paid more than she was, and that while the duties of management employees were varied, her duties were closely comparable in quantity and quality to the male managers.

Plaintiff has not come forward with any showing of the nature of duties actually required and performed, or the associated skill, effort, responsibility, or working conditions. It is the court's view that plaintiff's affidavit as

---

3. While plaintiff brings the same claim under the ICRA, the Equal Pay Act and Title 42, the analysis is essentially the same under each theory. *McKee v. Bi State Development Agency*, 801 F2d 1014, 1018 (8th Cir. 1986); *Lara v. Thomas*, 512 NW2d 777, 784 (Iowa 1994).

noted above is merely conclusory on this issue, and insufficient to establish a disputed issue of material fact. *See, e.g., Miller v. Citizens Security Group, Inc.*, 116 F3d 343, 346 (8th Cir. 1997) (conclusory statement in affidavit cannot create genuine issue of material fact which precludes summary judgment).

It is therefore

ORDERED

Granted.

December 16, 1997.

s/ Edward J. McManus
Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1232NICR

Rebecca A. Berg,

Plaintiff-Appellant,

v.

Norand Corporation,

Defendant-Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 9, 1999

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

No. 99-76

IN THE

Supreme Court of the United States

REBECCA A. BERG,

Petitioner,

v.

NORAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit properly affirmed the district court's grant of summary judgment to Respondent by concluding Petitioner presented insufficient evidence to show that the Respondent acted in a discriminatory or otherwise unlawful manner?

PARTIES TO THE PROCEEDING

The Petition accurately lists the names of the parties at the time the Petitioner's lawsuit was filed. Since that time, through a series of corporate acquisitions, the Respondent has been merged into Intermec Technologies Corporation, a Washington Corporation. UNOVA, Inc., a publicly held company, is the parent company of Respondent and owns all of its stock.

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STATEMENT OF THE CASE

On July 7, 1995, Petitioner, Rebecca A. Berg ("Berg") filed a complaint against her former employer, Norand Corporation ("Norand"), alleging disability discrimination in violation of 42 U.S.C. § 12101, *et seq.* (The Americans with Disabilities Act) and Iowa Code § 216 (1993) (the Iowa Civil Rights Act), wage discrimination in violation of 42 U.S.C. § 2000e, *et seq.* (Title VII), 29 U.S.C. § 215a(3) (Fair Labor Standards Act) and 29 U.S.C. § 206(d) (Equal Pay Act), negligent misrepresentation, breach of implied contract and false imprisonment. By order of the United States District Court for the Northern District of Iowa, Cedar Rapids Division, dated April 3, 1996, Berg's claim pursuant to the Fair Labor Standards Act was dismissed. Berg's remaining claims were dismissed by the district court when it granted summary judgment in favor of Norand because Berg did not establish even a *prima facie* case as to any claim. Pet. App. 15a-25a. The Eighth Circuit, in a unanimous panel decision, affirmed the district court's decision. Pet. App. 1a-14a. Berg's petition for rehearing and for rehearing en banc was subsequently denied. Pet. App. 26a. Only the Title VII and Equal Pay Act wage discrimination claims are included in Berg's Petition for a Writ of Certiorari.

Norand filed its Motion for Summary Judgment on August 25, 1997. Thus, Berg enjoyed the benefit of a two-year period of time within which she could attempt to gather evidence to support her wage discrimination claims. Norand's Brief in support of its Motion for Summary Judgment brought to the district court's attention Berg's failure to produce any evidence that she was paid less than her male counterparts at Norand, despite performing a job which required equivalent skill, effort and responsibility.

(App. 169.) Norand pointed out that Berg's own deposition testimony and her pleadings indicated only that some male employees received a higher wage than Berg, without indicating that any job performed by a male employee at Norand was equal to Berg's position in terms of skill, effort, responsibility and working conditions. (App. 170.) Thus, contrary to Berg's Petition, Norand specifically informed the district court of the basis for its motion for summary judgment on her wage discrimination claims and noted Berg's failure to articulate, in her deposition testimony or pleadings, any facts indicating that a male employee was paid more than Berg for an equivalent job.

Despite the clarity of Norand's Motion for Summary Judgment, Berg failed to respond withy any evidence that she was paid less than a male employee for equivalent work. Berg only provided a conclusory, self-serving affidavit and evidence that male employees in management positions were paid more than female employees in management positions. (App. 187.) Berg's misrepresentations to this Court notwithstanding, Berg failed to provide evidence that the positions held by male management employees were equal to management positions held by female employees. This critical lack of evidence led to the dismissal of her wage discrimination claims by the district court and the Eighth Circuit. Pet. App. 8a-10a, 23a-25a.

In her appeal to the Eighth Circuit Berg raised six issues for review. Pet. App. 4a-13a. Berg did not ask the Eighth Circuit to review the issue upon which she now bases her Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This case involved the application of well-established case law governing employment discrimination. Berg should not now be allowed to base her Petition for a Writ of Certiorari on an issue she did not raise below. Further, irrespective of Berg's failure to raise the issue below, the record makes clear that both the district court and the Eighth Circuit correctly applied the appropriate standard for summary judgment as set forth in Federal Rule of Civil Procedure 56. Finally, Berg presents no evidence that the courts of appeal, including the Eighth Circuit, are confused with regard to the proper standard for summary judgment in employment discrimination cases. Instead, Berg's Petition suffers from her confusion between the initial burden a movant for summary judgment must meet (and which was met in this case) and the burden on the non-moving party to provide some evidence that she will be able to prove an essential element of her claim. Berg simply ignores the fact that both the district court and the Eighth Circuit concluded that she did not present sufficient evidence to indicate that even a *prima facie* case of wage discrimination existed. Berg's last-ditch effort to avoid the consequences of her failure to present even a *prima facie* case of wage discrimination should be denied.

I.

BERG SHOULD NOT BE ALLOWED TO PREMISE HER PETITION FOR A WRIT OF CERTIORARI ON AN ARGUMENT SHE FAILED TO RAISE BELOW.

In her appeal to the Eighth Circuit Berg identified six issues for further review. Berg argued that genuine issues of

material fact existed as to her disability discrimination, negligent misrepresentation, breach of implied contract, false imprisonment and equal pay claims and that the district court erroneously denied her permission to file a responsive brief. The Eighth Circuit addressed and ruled against Berg on each issue raised. Berg now argues that the decisions of the district court, the Eighth Circuit Court of Appeals and other courts of appeal are inconsistent with this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (addressing the appropriate standard to be applied to motions for summary judgment). Berg's argument should be rejected because it was not raised below. *Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 379, n.5, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996) (noting that "we generally do not address arguments that were not the basis for the decision below").

II.

THE EIGHTH CIRCUIT'S OPINION IS CONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986).

Even if this Court were to entertain Berg's new argument, a writ of certiorari is not warranted because both the district court and the Eighth Circuit correctly applied the standard for summary judgment set forth in *Celotex*. Berg's failure to present any facts to establish a *prima facie* case under Title VII and the Equal Pay Act led to the dismissal of these claims.

In order to generate a *prima facie* case of wage discrimination, Berg needed to present evidence that Norand paid male employees more than it paid her for jobs which required ". . . equal skill, effort, and responsibility, and which

are performed under similar working conditions . . ." 29 U.S.C. § 206(d)(1) (1994); *see also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 513 (8th Cir. 1995). Prior to moving for summary judgment on Berg's wage discrimination claims, Norand reviewed Berg's pleadings, deposition transcripts and the paper discovery produced by both sides, finding no evidence to support her allegations. Consequently, Norand's Motion for Summary Judgment informed the district court that the pleadings and Berg's own deposition testimony on this issue were devoid of any evidence of wage discrimination. (App. 169-170.) Norand pinpointed the fatal flaw in Berg's wage discrimination claims. The district court and Berg were made aware that although Berg's deposition testimony established that she was paid less than some male employees, Berg had presented no evidence that the jobs held by these male employees were equivalent in skill, effort and responsibility and were performed under similar working conditions.

Berg enjoyed ample opportunity to discover and present evidence to support her claims both before and after Norand moved for summary judgment. Norand's motion was filed more than two years after Berg filed her Complaint. Berg was even granted an extension of time to file her response to Norand's motion in order to allow her to take an additional deposition. When Berg finally filed her resistance she still provided no evidence, her self-serving, conclusory affidavit notwithstanding, that any male employee was paid more for a job requiring equal skill, effort, and responsibility, and which was performed under similar working conditions.

The district court and the Eighth Circuit, recognizing the lack of evidence to support Berg's wage discrimination claims, granted and affirmed summary judgment in full

compliance with this Court's standards for summary judgement. Norand discharged its initial burden of informing the district court of the basis for its motion by pointing out that all Berg's deposition testimony and her pleadings established is that some male employees were paid more than Berg. *Celotex v. Catrett*, 477 U.S. at 323. Norand then informed the district court that no evidence indicated Berg's job was equivalent to any male employee's position. The district court and the Eighth Circuit, after reviewing Berg's response, rejected Berg's attempt to avoid summary judgment pursuant to this Court and Rule 56's directive that summary judgment should be entered if, after adequate time for discovery, the nonmoving party ". . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322 (*citing* Fed. R. Civ. P. 56).

III.

THE DECISIONS OF OTHER COURTS OF APPEAL ARE CONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 56 AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986).

Berg erroneously represents that a number of courts have held that the party moving for summary judgment is relieved of any burden if the nonmoving party cannot establish a *prima facie* case. Pet. 8. None of the cases to which Berg refers stand for this proposition.

For instance, *Brinkley v. Harbour Recreation Club*, No. 98-2035, 1999 U.S. App. LEXIS 13125 (4th Cir. June 14, 1999) did not address whether the movant had complied with

its initial responsibility of informing the court of the basis of its motion and identifying portions of the record which demonstrate that no genuine issue of material fact exists. Instead, the Fourth Circuit's analysis focused on the plaintiff's inability to proffer evidence supporting the existence of a *prima facie* claim of discrimination and whether the defendant's affirmative defense to the equal pay claim was valid and timely raised. *Id.* at *13. *See also Lyoch v. Anheuser-Bush Cos.*, 139 F.3d 612, 616 (8th Cir. 1998) (focusing on whether the non-moving party's evidence raised a genuine issue of material fact); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 478-483 (7th Cir. 1995) (affirming the entry of judgment against the plaintiff based on her inability to present evidence which would support a *prima facie* case of discrimination).

These courts' reference to the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) does not indicate confusion as to the requirements of Federal Rule of Civil Procedure 56(c). Instead, reference to *McDonnell Douglas* is consistent with Rule 56(c)'s mandate that summary judgment must be entered when the nonmoving party cannot present sufficient evidence ". . . to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. at 322.

Berg's confusion stems from her misunderstanding of the appropriate analysis employed by appellate courts throughout the United States. These courts, including the Eighth Circuit, are not "confused". As accurately articulated in *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995), the movant must first demonstrate that there is a lack of evidence to support the non-moving party's case.

After the moving party has met this initial burden, the nonmoving party must ". . . set forth specific facts to demonstrate that she has met her burden of establishing a *prima facie* case." *Id.*

CONCLUSION

Berg should not be allowed to raise a new and invalid issue in order to avoid the effect of her failure to present even a *prima facie* case of wage discrimination. The law and the facts applicable to this case are well established. An employee must produce evidence that a higher paid male employee is performing work which requires equal skill, effort, and responsibility, and which is performed under similar working conditions. Berg failed to produce any evidence to support this requisite element of her claim. For these reasons, Norand respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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